No. 82-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEON W. KNIGHT, *et al.*,

Appellants,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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APPELLANTS' OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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Pursuant to Rule 16.5 of the Rules of this Court, Appellants Leon W. Knight, *et alia,* hereby oppose Appellees' motions to affirm.

ARGUMENT

Appellees' silence concedes the substantiality of Appellants' contention that, by requiring the Board to negotiate exclusively with MCCFA over terms and conditions of employment in the community colleges, PELRA discriminatorily enhances MCCFA's influence over the course of public-policy decisionmaking, in violation of the principles of political equality this Court has consistently enforced through the Equal

Protection Clause of the Fourteenth Amendment.[1] For this reason alone, their motions should be denied. But even what Appellees say also compels denial of those motions.

First, Appellees claim that *Abood*[2] settled the issues in this appeal.[3] Yet Appellees nowhere contradict a single point in Appellants' explanation of why *Abood* did not decide—*and could not have decided*—these questions.[4] *Abood* upheld only the agency shop; *the constitutionality of exclusive representation the parties explicitly refrained from contesting, the lower courts assumed* sub silentio, *and this Court accepted as an unchallenged premiss.* Here, Appellants attack that very premiss. Rather than answering the questions they raise, citing *Abood* simply begs them.

Second, Appellees contend that PELRA delegates no governmental power to MCCFA because "the public employer is not required to agree to any particular proposal".[5] The delegation inheres, however, not in any requirement that the Board agree with "*particular* proposal[s]", but in PELRA's command that it *negotiate* over *all* terms and conditions of college employment. *PELRA makes fulfillment of the public interest in education contingent on the acquiescence of a specially privileged private group in the policies public officials desire to follow, or on the fortuitous ability of those officials to overcome whatever obstacles to the efficient functioning of public facilities that group may interpose through the direct action PELRA*

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[1] *See* Jurisdictional Statement (J.) at 23-26.

[2] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[3] Motion to Affirm [of Appellee State Officials] (S.) at 4-7; Motion to Affirm of Appellee Labor Organizations (U.) at 5-6.

[4] J. at 19-23.

[5] U. at 6 (emphasis deleted).

permits.[6] Pretending that this situation involves no delegation of governmental power is self-evidently ludicrous.[7]

Appellees complain that Appellants' delegation-argument rests "primarily on the conclusory opinions of [Appellants'] so-called expert witnesses", and that "[t]hese opinions have little factual basis".[8] Appellees forget that the testimony of Appellants' experts that public-sector collective bargaining delegates governmental power to private groups was *unimpeached and uncontradicted*—and that the only other relevant evidence in the record is the testimony of *Appellee State Officials' own* witness, the distinguished expert in industrial and labor relations from the University of Illinois, Professor Milton Derber, who defined PELRA's requirement that the Board negotiate with MCCFA as "a sharing of responsibility", and explained the statute as the result of "an increasing conviction that * * * State Legislator[s do] have the right and the power to delegate various of these responsibilities or to share them * * * with private groups".[9] The State Officials qualified Professor Derber as an expert-witness; and the UTP did not even bother to cross-examine him. Now is too late for Appellees to denigrate his testimony as "hav[ing] little factual basis".[10]

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[6] *See* J. at 14 & n.47.

[7] *See id.* at 13 & nn.43-45.

[8] U. at 7. The mischaracterization as "*so-called* experts" glosses over Appellees' failure to challenge the qualifications of any of these witnesses at trial.

[9] J. at 4-5.

[10] On appeal, Appellees cannot substitute their lawyers' arguments for the evidence they neglected to procure at trial. *See, e.g., In re Primus*, 436 U.S. 412, 434 n.27 (1978).

Third, Appellees question the materiality of *Schechter* and *Carter.*[11] *Schechter,* they say, involved "the requirement of separation of powers placed upon the federal government by the Constitution. It has nothing to say about how a state may elect to structure its government".[12] Actually, *Schechter* reached the separation-of-powers issue only after first rejecting as "unknown to our law" and "utterly inconsistent" with the Constitution the argument "that Congress could delegate its legislative authority to [private] trade or industrial association or groups".[13] *Schechter* thus applied a *due-process* limitation equally binding on Congress and the state legislatures.[14] The doctrine of separation of powers *eo nomine* may not limit the division of authority *within state government. But MCCFA is a private organization, not an agency of the government of Minnesota,* bringing it squarely within the first holding of *Schechter* and outside the separation-of-powers cases Appellees irrelevantly cite.[15]

Appellees claim *Carter* is inapposite because "in *Carter* there was a delegation to two private parties—the producers and the miners—who through agreement could enact wage rates binding on other private

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[11] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[12] U. at 7-8 (footnotes omitted).

[13] 295 U.S. at 537.

[14] *See* the incisive analysis of Mr. Justice Brennan, dissenting, in McGautha v. California, 402 U.S. 183, 271-73 (1971), *especially* at nn.21-23.

[15] *Contrast* the cases cited in U. at 7 n.5 *with* Crowell v. Benson, 285 U.S. 22, 57 (1932) ("[a] state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process").

parties", and because "[i]n the present case, the public employer participates in the negotiations".[16] Yet, functionally, the *Carter* situation differed not at all from that under PELRA. Here, a private group organized on the exclusive-representation principle seeks agreement from a public agency to impose certain economic conditions on dissenting individuals within the group. In *Carter,* the same overall result obtained, even though the private group was itself subdivided into two units. Certainly *Carter* did not rest on the mere plurality of mutually cooperating exclusive representatives exercising delegated legislative power.[17] Moreover, that here "the public employer participates in the negotiations" makes this *worse,* not better, than the *Carter* situation. Under the statute *sub judice* there, administrative officials of the national government could approve, disapprove, modify, or establish themselves the "codes" of economic law the private groups proposed—without any requirement that the officials *negotiate* "in good faith" with those groups. Nonetheless, *Carter* held this an unconstitutional delegation. Under PELRA, the Minnesota Legislature can approve or disapprove, *but not modify or establish itself,* the terms of collective-bargaining agreements with state employees[18]—subject always to the compulsion to *negotiate* with organizations such as MCCFA, or suffer the practical and political consequences of strikes.

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[16] U. at 8.

[17] To the contrary, the Court explained that "[t]he effect [of the statute], in respect of wages and hours, is to subject the dissentient minority, *either* of producers *or* miners *or* both, to the will of the * * * majority". 298 U.S. at 311 (emphasis supplied). The bifurcation of the delegation to private parties had nothing whatsoever to do with the decision.

[18] J. at 14-15 & n.48.

In short, if *Schechter* and *Carter* are not exactly on point here, it is only because PELRA delegates *more* governmental authority to private groups than did the statutes those decisions held unconstitutional. Appellees' reliance on *Sunshine*[19] merely highlights their refusal to face this fact. *Sunshine* upheld the amended version of the statute *Carter* invalidated, because the amendments "eliminated [the unconstitutional] provisions of the earlier Act", and because the private producer-groups "function[ed] subordinately" to an administrative agency with "authority and surveillance over [their] activities".[20] The agency had no duty to negotiate with private parties, and exercised plenary power to fix economic standards in the industry "when in the public interest it deems it necessary".[21] Here, conversely, PELRA compels the Board to negotiate with MCCFA, even while it imposes on MCCFA no duty to bargain only for those terms and conditions of employment that serve the interests of Minnesota's citizens.[22]

Fourth, Appellees complain that "Appellants' arguments are * * * inconsistent with positions which they

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[19] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

[20] *Id.* at 387, 399.

[21] *Id.* at 397.

[22] City of Richfield v. Local 1215, Fire Fighters, 276 N.W.2d 42 (Minn. 1979), *cited in* U. at 8 n.5, emphasizes the latter point. *Richfield* upheld the compulsory-arbitration provisions of PELRA because the statute "ensure[s] the competence and accountability of the arbitrators", empowers a public agency to disqualify arbitrators who "mak[e] awards that are totally inappropriate", and requires the arbitrators to "make awards only after considering the potential financial impact on the community". 276 N.W.2d at 47. Obviously, nothing in PELRA ensures the "accountability" of MCCFA, subjects it to censure by a public agency if it attempts to negotiate "totally inappropriate" terms and conditions of employ-

have maintained throughout this litigation".[23] Even if true, this would be irrelevant: For the District Court explicitly decided the delegation-of-power question, squarely presenting that issue for review here.[24] Typically, however, Appellees misrepresent Appellants' statement, which related only to Appellants' argument on the application of *Branti*,[25] not *Schechter* or *Carter*. If MCCFA were independent of the UTP, and not itself substantially involved in political activism, *Branti* would not apply, because PELRA would not require Appellants to associate with a predominantly political organization as a condition of their employment. *Schechter* and *Carter* would be applicable, though, because MCCFA would remain a private, self-interested group. If, conversely, MCCFA were a traditional faculty senate *that functioned as an arm of the community college-administration*,[26] then neither *Branti* nor *Schechter* and *Carter* would apply. No one contends that MCCFA is part of the college administration, rather than a private organization. Therefore, *Schechter* and *Carter* apply directly. The record proves that MCCFA is integrated in the UTP, and that the UTP is a political-action organization. Therefore, *Branti* also applies.

Fifth and last, Appellees contend that both the facts and the law militate against Appellants' claim under *Branti*.[27] On the facts, the record speaks for itself:

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ment, or precludes it from seeking its members' own political and economic self-interest heedless of "the potential financial impact on the community".

[23] U. at 9-10.

[24] *See* J. at 13-23.

[25] Branti v. Finkel, 445 U.S. 507 (1980). *See* J. at 27-28.

[26] *Cf.* NLRB v. Yeshiva Univ., 444 U.S. 672, 681-90 (1980).

[27] S. at 7-9; U. at 10-13.

The parties' own stipulations, the UTP's massive admissions, and the uncontradicted testimony of Appellants' expert-witnesses established at least a *prima facie* case that the UTP is an integrated, political-action organization. Appellants' expert-witness and the UTP's lay-witnesses in accounting agreed that the evidence it introduced in defense did not and could not differentiate its extensive political activities into the categories "politics unrelated to collective bargaining" and "politics related to collective bargaining.".[28] Thus, Appellants' case became conclusive. The District Court's purported "findings" to the contrary simply disregard or misrepresent the record, as any reasoning person can determine on inspection.[29]

On the law, Appellees claim that exclusive representation does not forcibly associate Appellants with MCCFA.[30] This is nonsense. Where an individual has a right to speak or act, he has an associational right of constitutional dimension to speak or act through a representative.[31] Logically, then, where PELRA compels Appellants to "meet and negotiate" with the Board through MCCFA as their exclusive representative, it imposes on them an associational relationship subject to constitutional scrutiny.[32] Moreover, this

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[28] *J.* at 8-12.

[29] *See* Appendix to Jurisdictional Statement *at* 151-437, *especially* at 335-93 (line-by-line comparison of District Court's "findings" to actual facts in the record).

[30] U. at 11-12.

[31] *E.g.*, Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 5-7 (1964); District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 221-24 (1967).

[32] *See* Abood, 431 U.S. at 232-35 (opinion of Stewart, J.). *Cf.* Democratic Party v. LaFollette, 450 U.S. 107, 122 & n.22.

Court has twice recognized that compulsory financial support of an exclusive representative "has an impact upon [employees'] First Amendment interests" and amounts to "forced association".[33] If mere financial support of the representative implicates First-Amendment interests, the statutory imposition of its representation on dissenting employees in the first instance must also raise constitutional issues. The *derivative* privilege to seize dissenting employees' monies to support the representative cannot logically constitute forced association if the *primary* privilege of being the representative does not.

Appellees then claim that *Branti* is inapplicable because exclusive representation does "not requir[e Appellants] to pledge allegiance [to] * * * or obtain the sponsorship of the MCCFA".[34] This is equally absurd. "Allegiance" is an "[o]bligation of fidelity and obedience to government in consideration for protection that government gives".[35] Both commentators and this Court have likened exclusive representatives to employees' "economic government".[36] And MCCFA's President testified that Appellants are obliged to accept the terms and conditions of employment MCCFA

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[33] Abood, 431 U.S. at 222 (opinion of Stewart, J.); IAM v. Street, 367 U.S. 740, 749 (1961).

[34] U. at 13.

[35] *Black's Law Dictionary* (rev. 4th ed. 1968), at 99.

[36] *E.g.*, Summers, "Union Powers and Workers' Rights", 40 *Mich. L. Rev.* 805, 815-16 (1951) ("[t]he union is * * * the employee's economic government"); Steele v. Louisville & N.R.R., 323 U.S. 192, 198-203 (1944) ("bargaining representative [is clothed] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents").

negotiates in consideration of its "fair representation" of them.[37] Similarly, a "sponsor" is "one who assumes responsibility for a person or a group".[38] This is precisely the function of any exclusive representative, and the very position MCCFA's President testified the organization occupies under PELRA.[39] Thus, this case exactly parallels *Branti*.

CONCLUSION

Appellees' motions to affirm being meritless, this Court should note probable jurisdiction and set this case down for full briefing and oral argument.

Respectfully submitted,

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[37] Transcript of Hearings Before Special Master Leonard K. Lindquist (T.) at 484-88. *See also* T. at 155-56, 208-09 (testimony of Appellants Knight and Kjer).

[38] *Webster's Seventh New Collegiate Dictionary* (1965), at 845.

[39] T. at 479-81.